LE COPY

Office-Supreme Court, U.S.
FILED
MAY 23 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

Number ~~954~~ 98

JOSEPH THOMAS, JOSEPH MARTIN, LEROY HENDERSON, ELIJAH WALKER, JESSIE GOODEN, RUSSELL ROBERTS, JACK BOYD AND OZZIE SMITH, JR., *Appellants*,

v.

PEOPLE OF THE STATE OF MICHIGAN, *Appellee*.

APPEAL FROM THE RECORDER'S COURT OF THE CITY OF DETROIT

STATEMENT AS TO JURISDICTION

HAROLD NORRIS
1179 National Bank Building
Detroit 26, Michigan

H. FRANKLIN BROWN
602 American Title Building
Detroit 26, Michigan

Attorneys for Appellants.

INDEX TO STATEMENT

Opinions Below	1
Jurisdiction	2
Ordinances & Statutes Involved	3
Questions Presented	4
Statement of the Case	5
The Questions Presented Are Substantial	14
Conclusion	17

INDEX TO APPENDIX

Charge of the Court	1
Order Denying Leave to Appeal	13
Order Affirming Denial of Leave to Appeal	14
Order Denying Stay, Etc.	15
Excerpts from Criminal Journal of the Recorder's Court of the City of Detroit	16

CITATIONS

Cantrell v. *Connecticut*, 310 U.S. 296	2
Chaplinsky v. *New Hampshire*, 315 U.S. 568	2
Cole v. *Arkansas*, 333 U.S. 196	2, 14, 16, 17
De Jonge v. *Oregon*, 315 U.S. 568	2
Hague v. *C. I. O.*, 307 U.S. 516	2, 12
Hague v. *C.I.O.*, 307 U.S. 516	2
Herbert v. *Louisiana*, 272 U.S. 312	2
Kovacs v. *Cooper*, 336 U.S. 77	14, 16, 17
Lovell v. *City of Griffin* (1938), 303 U.S. 444	2

Marsh v. *Alabama*, 326 U.S. 501 ..... 2, 16

Saia v. *New York*, 334 U.S. 588 ..... 2, 16

Schneider v. *New Jersey*, 308 U.S. 147 2

Williams v. *New York*, 337 U.S. 241 ..... 14, 16, 17

Winters v. *New York*, 333 U.S. 507 2

STATUTES

Compiled Laws of Michigan, 1948, Section 750.479 3

ORDINANCES

Municipal Code, City of Detroit, 1954
Chapter 223, Section 2 3

Chapter 330, Section 12(a) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

Number

JOSEPH THOMAS, JOSEPH MARTIN, LEROY HENDERSON, ELIJAH WALKER, JESSIE GOODEN, RUSSELL ROBERTS, JACK BOYD AND OZZIE SMITH, JR., *Appellants.*

v.

PEOPLE OF THE STATE OF MICHIGAN, *Appellee.*

APPEAL FROM THE RECORDER'S COURT OF THE CITY OF DETROIT

STATEMENT AS TO JURISDICTION

The appellants, pursuant to United States Supreme Court Rules 10, 13 (2) and 15, file this their statement of the basis upon which it is contended that the Supreme Court has jurisdiction on appeal to review the final judgments and convictions in question and should exercise such jurisdiction in this case.

OPINIONS BELOW

The Recorder's Court for the City of Detroit rendered no written report or opinion on the case. Nor was any written opinion rendered by the Supreme Court of the State of Michigan when it denied the allowance of an appeal. However, the manner in which the Recorder's Court construed and applied the City Ordinances and State Statutes in question is revealed in part in that Court's charge to the jury, a copy of which is set forth in the appendix hereto.

JURISDICTION

The appeal herein is from final judgments of conviction of appellants entered in the Recorder's Court for the City of Detroit upon findings of "Guilty" made by a jury that appellants obstructed, resisted, opposed, and assaulted a police officer in the discharge of his duty, in violation of Section 750.479 of the Michigan Compiled Laws of 1948.

The final judgments of conviction appealed from were entered December 17, 1957. A Motion for a New Trial was denied on March 25, 1958. Application for Leave to Appeal to the Supreme Court of the State of Michigan was denied on October 12, 1959, and a Motion to Reconsider was denied November 24, 1959. A Petition for Bail was filed in the Supreme Court of Michigan and denied on November 30, 1959. On December 2, 1959, this Court granted appellants' application for admission to bail pending timely application to this Court for review. Notice of Appeal was filed February 25, 1960. By stipulation of the parties, approved by the Recorder's Court of the City of Detroit, time within which appellants might file their Record and Jurisdictional Statement in this Court was extended to May 25, 1960.

The Supreme Court of the United States has jurisdiction to review by direct appeal the judgments complained of under the provisions of 28 U.S.C.A., Section 1257 (2).

The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgments, on direct appeal in this case: *Hague* v. *C. I. O.* 285 U. S. 427; 27 A. J., Page 612; *Cole* v. *Arkansas*, 333 U. S. 196; *Hague* v. *C. I. O.* 307 U. S. 516; *Marsh* v. *Alabama*, 326 U. S. 501; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Lovell* v. *City of Griffin* (1938), 303 U. S. 444; *Schneider* v. *N. J.*, 308 U. S. 147; *Herbert* v. *Louisiana*, 272 U. S. 312; *Winters* v. *New York*, 333 U. S. 507; *DeJonge* v. *Oregon*, 299 U. S. 353; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568; *Saia* v. *New York*, 334 U. S. 588.

ORDINANCES AND STATUTES INVOLVED

Municipal Code—City of Detroit—1954, Chapter 223, Page 616. Sec. 2. Any person or persons who shall make or assist in making any noise, disturbance, or improper diversion, or any rout or riot, by which the peace and good order of the neighborhood are disturbed, shall be guilty of disorderly conduct and shall be punished as hereinbefore provided.

Chapter 330—Section 12 (a), Page 1049

"It shall be unlawful for any person to assemble, congregate or gather with others in crowds on any sidewalk or street, or upon the Campus Maritus, in such a manner as to obstruct or incommode public travel or the public use or enjoyment of the same."

C. L. of 1948—750.479

Resisting, etc., officer in discharge of duty.

"Any person who shall *knowingly* and *wilfully* obstruct, resist or oppose any sheriff, coroner, township treasurer, or, constable or other officer or person duly authorized, in serving, or attempting to serve or execute any process, rule or order made or issued by lawful authority, or who shall resist any officer in the execution of any ordinance, by law, or any rule, order or resolution made, issued, or passed by the common council of any city board of trustees, or common council or village council of any incorporated village, or township board of any township or who shall assault, beat or wound any sheriff, coroner, township treasurer, constable or other officer duly authorized, while serving, or attempting to serve or execute any such process, rule or order, or for having served, or attempted to serve or execute the same, or who shall *so* obstruct, resist, oppose, assault, beat or wound any of the above named officers or any other person or persons authorized by law to maintain and preserve the peace, in their *lawful* acts, attempts and efforts to maintain and preserve and keep the peace, shall be guilty

of a misdemeanor punishable by imprisonment in the state prison not more than two (2) years, or by a fine of not more than One Thousand Dollars ($1,000.00)

(C. L. Michigan '48, 750.479).

QUESTIONS PRESENTED

The questions presented by this Appeal are as follows:

1. Where a Municipal Ordinance makes it an offense "for any person to assemble, congregate or gather with others in crowds, on any sidewalk or street in such a manner as to obstruct or incommode public travel or the public use or enjoyment of the same," and where a person stands on a box, and the box is on the unpaved section between the sidewalk and curb, and said person is expressing his religious views to any and all who might listen, and a police officer purporting to act under said ordinance, restrains or interferes with such person in the exercise of his rights to freedom of speech and religion and the ordinance is construed to authorize such police to so restrain and interfere with such person, is said ordinance unconstitutional as being on its face and as applied in violation of the 14th Amendment to the Constitution of the United States? If so,

   (a) Is a listener who is accused of resisting a police officer while the police officer is restraining and interfering with the exercise of the speaker's rights guilty of violating a state statute which makes it a felony "to obstruct, resist, oppose, assault, beat or wound a police officer in their lawful acts, attempts and efforts to maintain and preserve and keep the peace?"

   (b) Where the existence of the conditions prohibited by said ordinance is a necessary element to support a conviction under a state statute which makes it a felony "to obstruct, resist, oppose, assault, beat or wound a police officer in his lawful acts, attempts, and

efforts to maintain and preserve and keep the peace," does the arrest, trial, conviction and sentence to imprisonment of appellants for violation of the state statute by obstructing, resisting, opposing, assaulting, beating and wounding a police officer while attempting to enforce said ordinance in the manner stated deprive appellants of their liberty without due process of law contrary to the 14th Amendment to the Constitution?

2. Whether the Municipal Ordinance of the City of Detroit which makes it a criminal offense to ". . . assemble, congregate, or gather with others in crowds on any sidewalk or street . . . in such a manner as to obstruct or incommode public travel or the public use or enjoyment of said same" is void as being in violation of the 14th Amendment to the Constitution of the United States in that said ordinance prohibits the exercise by citizens of the rights of freedom of religion, speech, and assembly under the guise of regulating pedestrian and vehicular traffic and makes such regulations paramount to the constitutional rights of citizens to freedom of speech, religion and assembly?

3. Where a statute makes criminal certain conduct when engaged in "knowingly and willfully," does conviction on an information or indictment that fails to charge that the proscribed acts were "knowingly and willfully" committed deprive defendants of due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States, in that defendants were convicted on a charge not made or tried?

STATEMENT OF THE CASE

On Sunday, July 7, 1957, in the City of Detroit, Michigan Appellants, and several members of their Church, The Temple of Islam, after having attended Sunday services proceeded to have dinner at the Shabazz restaurant on Russell Street; after dinner a group of eight or ten per-

sons, including seven of the Appellants decided to continue the teaching of their religion on Hastings Street because it was felt they could be helpful to the people of this area teaching brotherhood, peace, cleanliness and financial independence which would have the effect of making better citizens of the people in the area and win greater respect for them. They drove to Hastings and Illinois Streets, parked their cars and began selling the Pittsburg Courier as they walked. The Courier is the Negro Newspaper in the United States, having the largest circulation and this newspaper features a weekly article by the National Spiritual leader of the Muslim religion. They stopped at the northeast corner of Hastings and Livingstone because they saw a shoeshine stand that was standing near, attached by a chain to a pole that had a stop sign on it. One Cara Woods was speaking and two police vehicles drove by, one going south and one going north on Hastings Street. These police vehicles, like other motor vehicles passing by, did not have any difficulty getting through the intersection of Hastings and Livingstone. While some people stopped at the intersection and listened to the speaker or buy a newspaper, pedestrians could and did walk by without obstruction on the sidewalks. While Mr. Woods was speaking several scout cars, at first four in number and later many more, came into the intersection from different directions. From one of these police vehicles a police sergeant appeared and the sergeant proceeded directly to the shoeshine stand where the speaker was standing and speaking. The size of the stand was that of an ordinary chair in height and width and not large enough for two larger persons to stand at the same time. The sergeant pushed the speaker off the stand and the speaker tried to prevent himself from falling by holding on to the pole with the stop sign on it with his left hand. He was pulled down and a general disturbance followed. As part of the statement of fact it is petitioners theory of defense that there was no violation of the ordinances prohibiting

disturbances of the peace or obstructing public travel; that no such violation was committed, but if committed at all, was not committed in the presence of a police officer and hence could not be the lawful reason for an arrest; that there was no disturbance until the police arrived and the sergeant pushed the speaker off the stand; that because no violation of ordinances occurred the police officers did not engage in lawful acts to maintain the peace in arresting the Appellants, and Appellants cannot be found guilty of obstructing, resisting, opposing, assaulting, beating and wounding one Max Neuendorf because Max Neuendorf was acting unlawfully.

Further, that no violation of the ordinances regarding disturbance of the peace and obstructing public travel having occurred, the police officer under the guise of regulating conduct under the ordinances in breaking up the assembly of citizens thus did deny to citizens and Appellants, their constitutional rights to speech, religion and assembly.

And further the Appellants and each of them did not obstruct, resist, oppose, assault, beat, wound one Max Neuendorf; that the Appellants did not commit an assault upon one Max Neuendorf and the Appellants did not obstruct public travel or disturb the peace.

The Appellants consisting of seven members of the Temple of Islam and one bystander were arrested at the intersection of Hastings and Livingstone Streets, Detroit, Michigan, and were charged with resisting police officers in the performance of their duties, and also charged with violation of two City Ordinances of the Municipal Code.

On July 8, 1957, all of the Appellants were released on a Writ of Habeas Corpus and Bond set in the amount of Five Hundred Dollars ($500.00) each and the case adjourned until July 9th, 1957 for the police to request Warrants. Warrants issued and the same Bond continued and an Examination requested.

Examination was held on August 1, 1957 before the Honorable John P. O'Hara, Recorder's Court Judge, and at the

conclusion of the Examination a Motion to Dismiss was was made because the People of the State of Michigan had not proved that a crime had been committed and hence insufficient proof was presented to show that Appellants had resisted officers knowingly and willfully in the performance of a lawful duty. That the two City Ordinances were unconstitutional on their face and as applied, being contrary to the freedom of speech, press, assembly and religion as guaranteed by the First and Fourteenth Amendments of the United States Constitution and Sections 2, 3, and 4 of Article II of the Constitution of Michigan (Transcript of Examination PP. 42-63). The Court took said Motion to Dismiss under advisement and on August 12, 1957 denied said Motion and all defendants were bound over for Trial. The Court stated "well, the defendants will be bound over for trial, and the bond requirement in each case will remain the same." (T. P. 63).

On September 12, 1957 all defendants were arraigned on an Information and charged with violation of section 750.479 of the Compiled Laws of 1948; that a timely Motion to Quash the Information was filed; that the Presiding Judge failed to rule on Motion to Quash saying that it could be heard by the Trial Court which is seemingly the practice contrary to Rule 28 of the Recorder's Court.

December 12, 1957 the case was assigned to the Honorable Gerald W. Groat, one of the Recorder's Court Judges for a Hearing on Motion to Quash, and Trial, if said Motion to Quash Information was denied; that said Motion to Quash was argued extensively for twenty-two transcript pages and the Court stated "Well, I have read this transcript (Prelimniary examination) and I have read the cases you have cited, I have followed your brief that you handed the Court this morning, and I have spent some time on some other things that you haven't brought out. And as to the Motion to Quash the Information, I will deny it. We'll take a short recess and then we will get a Jury." (T. Vol. 1—Page 29).

That a Jury of fourteen members were impanelled and the case was started on December 12, and concluded on December 17, 1957; that at the conclusion of the case, the Motion to Quash was renewed and the Constitutional questions of the First and Fourteenth Amendments, together with the Section of the Michigan Constitution were renewed and denied.

That prior to the Court's charge to the Jury we presented ten written requests to Charge to the Court and the Court gave Request 1 as stated; Request 2 was Modified; Request 3, was not given; Request 4 Modified; Request 5, given as requested; 6 partially given; Request 7, concerning the Constitutional question omitted as inapplicable; Request 8, omitted in part as not applicable; Requests 9 and 10 not given.

That the jury found all defendants guilty as charged and all were referred to the Clinic and Probation departments for sentence on December 31, 1957.

That on December 31, all defendants were sentenced as follows:

1. Joseph Thomas—3 months to 2 years—Jackson State Prison; and
2. Joseph Martin—2 years Probation, full restitution, $50.00 Cost; and
3. Jessie Gooden—2 years Probation, full restitution, $50.00 Cost; and
4. Russell Roberts—2 years Probation, full restitution, $50.00 Cost; and
5. Leroy Henderson—3 months to 2 years, Jackson State Prison; and
6. Elijah Walker—3 months, Detroit House of Correction; and
7. Jack Boyd—3 months to 2 years, Jackson State Prison; and,

8. Ozzie Smith, Jr.,—3 months to 2 years, Jackson State Prison.

That on December 31, 1957, a Notice of Hearing and Motion for a New Trial was filed; a Waiver of four (4) days Notice was obtained from the Prosecutor; that on January 2, 1958, five defendants were admitted to Bond of $1000.00 each and three defendants were released on personal bond pending the Motion for a New Trial. The Motion for a New Trial was concluded on March 25, 1958, after several adjournments, and denied without a reason or written opinion.

The Appellants were all convicted in the Recorders Court of the City of Detroit on December 17, 1957; that after sentence on December 31, 1957, a timely Motion for a New Trial was filed and all Appellants were free on bond in the amount of One Thousand Dollars ($1000.00) each; that pending Leave to Appeal to the Michigan Supreme Court bond was continued until November 30, 1959 when the Petition to Stay Proceedings pending Petition for Writ of Certiorari to the Supreme Court of the United States; the Michigan Supreme Court denied bond and five Appellants were granted a Petition for Admission to Bond by the Supreme Court of the United States and the three Appellants who were given probation by the Recorder's Court were placed on personal bond. All Appellants are now free pending the Petition for Writ of Certiorari.

The federal questions were first raised at the end of the Examination of Appellants on August 1, 1957 on a Motion to Dismiss because the State had failed to establish a Corpus Delicti hence no crime had been committed; that from the testimony as given by the witnesses raised a constitutional question, both under the constitution of the State of Michigan, Article II Section 2, 3 and 4, and the U. S. Constitution that the rights of freedom of speech, religion and assembly had been abridged. (See Transcript of Examination, PP. 43-62).

The Appellants further raised the Constitutional question on September 17, 1957 when a Motion to Quash Infor-

nation was filed with the Recorder's Court of the City of Detroit and the Motion attacked the following things: Namely:

1. Preliminary examination failed to establish a corpus delicti;

2. Failure to establish the commission of an offense by any of the defendants or probable cause for charging any of the defendants therewith, and

3. Because the traffic ordinance which Officer Neuendorf and other police officers were attempting to enforce at the time and place in question is unconstitutional and void on its face and as applied, being contrary to the freedom of speech, press, assembly and religion as guaranteed by the First and Fourteenth Amendments of the United States Constitution and Sections 2, 3, and 4 of Article II of the Constitution of Michigan.

That on September 26, 1957 an Amendment to Motion to Quash Information was filed and stated that "Scienter" being a necessary ingredient under the Statute which had not been alleged or charged. (Pages 1, 2 and 3 of Motion).

That said Motion to Quash was not heard by the Presiding Judge as per rules of the Court, but passed on to the Trial Judge to hear at the Trial on December 12, 1957; that said Motion was argued extensively before the Honorable Gerald W. Groat, Recorder's Judge and said Motion was denied and the Court stated "Well, I have read this Transcript and I have read the cases you have cited, I have followed your brief that you handed the Court this morning, and I have spent some time, on some other things that you haven't brought out. And as to the Motion to Quash Information, I will deny it. We'll take a short recess and then we will get a Jury." (T. Vol. 1, Page 29).

December 17, 1957, at the conclusion of the Trial, prior to Oral Argument to the Jury, a timely Motion to Dismiss was made based on the sufficiency of the Information and/or

Indictment on its face stating that all defendants were denied due process of law under the Fourteenth Amendment on charges not made or tried; *Hague* v. *U. S.* 285; U. S. 457; 27 A. J. Page 612. Motion was denied without a reason or opinion given.

The Constitutionality of the Ordinances involved were also argued and denied.

The Federal question was raised in the Request to Charge submitted by the Appellants and request Number 7, the Appellants stated:

"I further charge you that the defendants and each of them did have a constitutional right under the United States and Michigan Constitutions to use the sidewalks and streets for the exercise of their rights of freedom of religion, freedom of assembly and freedom of speech and that it is not lawful for officers to enforce or regulate conduct thereunder an ordinance or ordinances in such a way as to abridge or deny these constitutional rights of the defendants." and in charge number 8; the request was:

"I further charge you that the defendants are also charged with violating two ordinances of the City of Detroit; these Ordinances alleged to be involved are:"

"It shall be unlawful for any person to assemble, congregate or gather, with others in crowds on any sidewalk or street or upon the Campus Martius, in such a manner as to obstruct or incommode public travel or the public use of enjoyment of the same."

and

"Any person or persons who shall make or assist in making any noise, disturbance or improper diversions, or any rout or riot, by which the peace and good order of the neighborhood are disturbed, shall be guilty of Disorderly Conduct and shall be punished as hereinbefore provided."

"Now it is the contention of the defense that the first

ordinance is unconstitutional on its face, and if not unconstitutional on its face, the application of said ordinance is unconstitutional because it places blocking and obstructing of traffic above the rights of freedom of speech, freedom of assembly and freedom of religion as guaranteed by the Federal and State Constitution: Now I charge you as a matter of law that the Constitutionality or unconstitutionality of a law, ordinance or statute is within the province of the Court and you may not pass on this phase of the matter, but it is within the province of the jury as the trier of facts whether or not these eight defendants did congregate, assemble or gather on the streets of Hastings and Livingstone in such a manner as to obstruct or incommode public travel or the public use of enjoyment of the same. I further charge you that you must find beyond a reasonable doubt, as hereinbefore defined, that the defendants, and each of them, did assist in making noise, disturbance or improper diversions or rout or riot by which the peace and good order of the neighborhood was disturbed; in the presence of the said MAX NEUENDORF; that I further charge you that you must take into consideration the testimony as given and determine whether or not there had been a disturbance of the peace prior to the arrival of the police and that it became necessary for the police to take the action described because of the disturbance; If you find that there was no disturbance of the peace by each of the defendants prior to the time that MAX NEUENDORF arrived then you must find each of them not guilty, but on the other hand if you find from the testimony beyond a reasonable doubt that at the time that MAX NEUENDORF arrived at the scene the said MAX NEUENDORF found that there was a disturbance of the peace by each of these defendants in the presence of MAX NEUENDORF, then it is your duty to return a verdict of guilty for each of the defendants, or to such defendants that you find are guilty of such act or acts as determined by the evidence beyond a reasonable doubt.

I have stated to you that these violations of these ordi-

nances must have been in the presence of MAX NEUENDORF because unless a misdemeanor is committed in the presence of a Police Officer he has no legal right to make an arrest without a valid warrant. I further charge you that each of the defendants that are charged of violating the law must have violated the law in the presence of MAX NEUENDORF, because the Information only charges the defendants with acts against the said MAX NEUENDORF and until the Information is proved as charged, you must acquit the defendants."

The Court stated: "Request No. 7, I omit as inapplicable." Request No. 8, I omit in part. It does not reflect the law here applicable. (T. PP. 200-201).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The Validity of the City Ordinances under the Federal Constitution was drawn in question by objections properly and timely made at the conclusion of the Examination held on August 1, 1957 on a Motion to Dismiss. It was argued that the two City Ordinances were unconstitutional on their face and as applied, as contrary to the freedom of speech, press, assembly and religion as guaranteed by the First and Fourteenth Amendments of the United States Constitution and Sections 2, 3 and 4 of Article II of the Constitution of Michigan. It was argued that the Appellants were charged under a State Statute of Obstructing, Resisting and Opposing Officers in the Lawful performance of a Duty, yet the basis of the alleged duty was found in the purported violation by two City Ordinances: However, the Appellants were not charged with violation of these Ordinances; hence there is a felony conviction had on a charge not made or tried, a clear denial of due process. *Kovacs* v. *Cooper*, 336 U. S. 77; *Williams* v. *New York*, 337 U. S. 241; *Cole* v. *Arkansas*, 333 U. S. 196. Also see pages 42 to 63 Transcript of Examination.

The Motion to Dismiss was taken under advisement by

the Court and on August 12, 1957 the Court denied said Motion and all defendants (Appellants) were bound over for trial. The Court stated "Well, the defendants will be bound over for trial, and the bond requirement in each case will remain the same." (Transcript page 63).

A Motion to Quash the Information was filed on September 17, 1957 and substantial federal questions were raised stating that:

1. The Preliminary examination failed to establish a corpus delicti;

2. The information failed to establish the commission of an offense by any of the defendants or probable cause for charging any of the defendants therewith, and

3. The traffic ordinance which Officer Neuendorf and other police officers were attempting to enforce at the time and place in question is unconstitutional and void on its face and as applied for the reason that said ordinance is contrary to the freedom of speech, press, assembly and religion as guaranteed by the First and Fourteenth Amendments of the United States Constitution and Sections 2, 3, and 4 of Article II of the Constitution of Michigan.

On September 26, 1957 an Amendment to the Motion to Quash Information was filed stating that "Scienter" though a necessary ingredient under the Statute had not been alleged or charged. (Page 1, 2 and 3 of Motion.)

This Motion and the Amended Motion to Quash Information was heard by the trial Court on December 12, 1957 and was argued extensively. After argument the Court stated: "Well, I have read this Transcript (Examination) and I have read the cases you have cited, I have followed your brief that you handed the Court this morning, and I have spent some time, on some other things that you haven't brought out. And as to the Motion to Quash Information, I will deny it. We'll take a short recess and then we will get a Jury." (Trial Transcript Vol. 1, Page 29).

On December 17, 1957, at the conclusion of the Trial and prior to Oral Argument to the Jury, a timely Motion to Dismiss was made based on the insufficiency of the Information and the unconstitutionality of the two City Ordinances as applied. Said Motion was denied without a reason or opinion given.

The Federal question was again raised in the Request to Charge submitted by the Appellants as shown above in section (d) herein. The Court stated as to Request of Charge No. 7, "Request No. 7, I omit as inapplicable", "Request No. 8, I omit in part. It does not reflect the law here applicable." (T. pp 200-201).

The questions presented in this Appeal are so substantial as to require plenary consideration by this Court for the following reasons; Namely;

1. The use of the Ordinance as the base or foundation of a charge of Obstructing, Resisting, Opposing Police Officers in the Lawful Performance of a Duty is infirm in law and in fact. For Ordinances directly as applied and indirectly as a base of the charge infringe on the constitutional right of freedom of speech, Press, Assembly and Religion as guaranteed by the First and Fourteenth Amendments of the United States Constitution. Without the use of said Ordinance there would be no violation either in law or fact. A fortiori the charge itself should then fall. And further the conviction under the State Statute is based on a charge not made or tried. Thus the conviction of Appellants under such circumstance deprive them of their liberty without due process of law contrary to the 14th Amendment of the Constitution. *Saia* v. *N. Y.*, 334 U. S. 558; *Marsh* v. *Alabama*, 326 U. S. 501. *Cole* v. *Arkansas*, 33 U. S. 196, *Kovacs* v. *Cooper*, 336 U. S. 77, *Williams* v. *N. Y.*, 337 U. S. 241.

2. The Appellants were convicted under a Statute which makes certain criminal conduct when engaged in "Knowingly and Willfully". The Information and/or Indictment failed to charge that the proscribed acts were "Knowingly

and Willfully", committed. This Court has held that it is as much a violation of due process to send an accused to prison following conviction on a charge on which he was never tried as it would be to convict him upon a charge which was never made, *Kovacs* v. *Cooper*, 336 U. S. 77; that due process of law requires that no person shall be tried and convicted unless he is given a reasonable notice of the charges against him and is afforded an opportunity to examine adverse witnesses on the charge of which he has notice. *Williams* v. *New York*, 337 U. S. 241; and that Notice of the specific charge and a chance to be heard in a trial of the issues raised by that charge, if desired, is the constitutional right of every accused in a criminal proceeding in all Courts, state or federal, *Cole* v. *Arkansas*, 333, U. S. 196.

Appellants strongly urge that "Knowingly and Willfully" obstruction and resistance are essential ingredients of the statory offense and a complaint or information that failed to charge knowledge or willfulness would be constitutionally insufficient to sustain a conviction.

CONCLUSION

For the foregoing reasons, It is respectfully submitted that this Notice of Appeal to bring before this Court, the decision and judgment of the Recorder's Court for the City of Detroit and the Michigan Supreme Court, should be granted.

HAROLD NORRIS
1179 National Bank Building
Detroit 26, Michigan

H. FRANKLIN BROWN
602 American Title Building
Detroit 26, Michigan

Attorneys for Appellants.

APPENDIX

CHARGE OF THE COURT

THE COURT: Ladies and gentlemen of the Jury, the information in this case charges: "In the name of the People of the State of Michigan, Gerald K. O'Brien, Prosecuting Attorney in and for the said County of Wayne, who prosecutes for and on behalf of said State in said Court, comes now here in the July term thereof, A.D. 1957, and gives the said Court to understand and be informed that Joseph Martin, Joseph Thomas, Jessie Gooden, Russell Roberts, Leroy Henderson, Elijah Walker, Jack Boyd, and Ozzie Smith, Jr., late of the said City of Detroit, in said county, heretofore, to wit, on the 7th day of July, A.D. 1957, at the said City of Detroit, County aforesaid, did then and there obstruct, resist, oppose, assault, beat and wound one Max Neuendorf, a member of the Metropolitan Police Department of the City of Detroit, and duly authorized by law to maintain and preserve the peace, while he, the said, Max Neugndorf, was then and there lawfully attempting to disperse a crowd of people who were blocking traffic and disturbing the peace at Hastings and Livingston in the City of Detroit; contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the People of the State of Michigan.

Now, this document from which I have just read is known in law as an information. This information is drawn or laid under Section 750.479 of the Compiled Laws of 1948, and the statute reads as follows: "Any person who shall knowingly and willfully obstruct, resist, or oppose any sheriff coroner, township treasurer, constable, or other officer or person duly authorized, in serving or attempting to serve or execute any process, rule, or order made or issued by lawful authority, or who shall resist any officer in the execution of any ordinance, by-law, or any rule, order, or resolution made, issued or passed by the common council or any city trustees, or common council, or village council of any

incorporated village, or township board of any township, or who shall beat, or wound any sheriff, coroner, township treasurer, constable, or other officer duly authorized while serving or attempting to serve or execute any such process, rule, or order, or for having served or attempted to serve or execute the same, or who shall so obstruct, resist, oppose, assault, beat, or wound any of the above-named officers or any other person or persons authorized by law to maintain and preserve the peace in their lawful acts, attempts and efforts to maintain, preserve, and to keep the peace, shall be guilty of a misdemeanor", and so forth.

Now, ladies and gentlemen of the Jury, in order to sustain a conviction the State is required to prove each and every element of the offense beyond a reasonable doubt. The State is required to prove, among other things, that the offense, if any, was committed by the defendant or defendants at the time in question, this being on the 7th day of July, A.D. 1957; that the offense, if any, was committed within the corporate limits of the City of Detroit.

Now, it is the theory of the People in this case that the officer of the Detroit Police Department observed a crowd of people, one to two hundred in number, at the intersection of Livingston and Hastings Street in the City of Detroit, being held there by a speaker; said crowd was blocking vehicular and pedestrian traffic; that Sergeant Neuendorf returned to disperse said blocking of traffic by the crowd; that he was assaulted by one of the—by one and obstructed by others in an effort to disperse said group.

Now, the defendants by their pleas of not guilty deny each and every allegation set up by the People.

Now, the Court will tell you what constitute the elements that go to make up the charge and give you the law in reference thereto. The charge is commonly known as obstructing, resisting and assaulting a police officer in the performance of his duty. Now, the law exacts certain duties of officers, including police officers, and the statute was designed to protect them in the discharge of such duties by imposing a

penalty upon any person who shall knowingly and willfully resist or oppose them in such performance. The words obstruct, resist, and oppose are are in common use and you should apply them in their ordinary accepted sense in determining whether or not the defendant or defendants are guilty. To constitute the offense it is necessary for the prosecution to establish that the police officer, Max Neuendorf, was duly authorized to perform the acts which he was engaged in; that the defendants individually or acting in concert knowingly and willfully obstructed, resisted, or opposed him in the performance of such duty. A person cannot be convicted of the offense unless you jurors are satisfied that such person knew that Max Neuendorf was a police officer, that he was engaged as a police officer in lawfully attempting to disburse a crowd of people who were blocking traffic and disturbing the peace, or both, at Hastings and Livingston in the City of Detroit. If you are satisfied from the evidence that Neuendorf was so acting as a police officer and was attempting to disburse a traffic block of people, and to break up a disturbance of the peace, both of which are violations of the City Ordinances, and if you are satisfied that the defendants knowingly and willfully obstructed, resisted, or opposed such officer, then, as to any defendant you find he did so obstruct, resist, or oppose such officer's efforts, or assisted others in obstructing, resisting, or opposing such officer's efforts, you have found the elements of the offense charged, and your verdict should be as to each such defendant, guilty as charged of resisting, opposing or obstructing a police officer in the performance of his duty.

Now, the defendants through their attorney have presented certain requested charges. So far as they are proper to present and the law of the case, I give them to you. Some I omit because they do not reflect the law as applied to this case.

Request No. 1 is that I read the information, which I have done; also the statute on which the case is here based, which

I have done. So omitting the penalty clause which you need not consider and the last paragraph I give it in modified form.

I charge you that in order to find any particular defendant guilty of the offense charged, you must find beyond a reasonable doubt that such defendant, each of them whom you find guilty, on the 7th day of July 1957, at the intersection of Hastings and Livingston Streets in the City of Detroit did obstruct, or resist, or oppose, or beat, or wound Max Neuendorf, a member of the Police Force of the City of Detroit, while he was lawfully engaged in the performance of his duty.

Request No. 2 I give with modification, where the statute requires that in order to constitute the offense the act must be done knowingly and willfully. The Court construes these words literally. To convict the defendants or any defendant, you must be first satisfied from the evidence beyond a reasonable doubt that such defendant knew that Max Neuendorf was at the intersection to dispese a crowd which was alleged to be blocking traffic and disturbing the peace, and that knowing such facts, such defendant intentionallly did resist, or obstruct, or oppose, or beat or wound Max Neuendorf while executing his duty. The words "knowingly" and "willfully" require that to be guilty, any defendant knew that Max Neuendorf was in the act of attempting to disperse a crowd which was blocking traffic or disturbing the peace, or both, and that the defendants, or any one of them you find guilty, acted to prevent Max Neuendorf from performing his lawful duty as a police officer, or to resist; obstruct, or oppose his performance.

No. 3 I do not give.

No. 4 I give as modified. I have charged you that the People must prove each of the defendants guilty of the offense charged beyond a reasonable doubt. A reasonable doubt means exactly what it says: it does not mean beyond

all doubt, it means that after you have reviewed all of the testimony that you have heard from the witness stand, that there is not a reasonable doubt in your mind that as to each defendant, considering each separately, such defendant did with intent obstruct, resist, or oppose the officer in performing his duties and knowingly would so obstruct such officer and that they were opposing and resisting him.

Request No. 5 I give as requested.

Now, the defendants in this case are presumed to be innocent until proven guilty beyond a reasonable doubt. The presumption of innocence attaches and abides with them throughout the trial and throughout your deliberations until you and each of your are satisfied beyond a reasonable doubt of their guilt.

Now, a reasonble doubt is not a vain, impossible, imaginary or captious doubt, but a fair doubt, one founded upon reason and common sense, or the lack of evidence itself. It has been said to be such a doubt that after careful reviewing of all of the testimony you cannot say that you have an abiding conviction amounting to a moral certainty of the defendant's guilt. If you have such a doubt it is your duty to acquit the defendants, or those of them you feel are not guilty. If you have no such doubt, then it is your duty to convict them.

Request No. 6 I give as requested in the first paragraph, changing the word "each" to "any".

The second and third paragraphs of Request no. 6 I omit. They are not here applicable.

Request No. 7 I omit as inapplicable.

Request No. 8 I omit in part. It does not reflect the law here applicable.

I give part, as modified.

I charge you that you must consider the testimony to decide whether or not there was a traffic violation or a

disturbance of the peace, or both, which made it necessary for the police to take the action they did.

The traffic block or disturbance need not have been created by the defendants or any one of them, they may or may not have participated.

If you find there was such a traffic block or a disturbance, if you find beyond a reasonable doubt that there was, and that Neuendorf was acting lawfully to break up the traffic block or the disturbance, or either, and that the defendants, or any one of them, separately or acting in concert with others, actively obstructed Neuendorf in the performance of his duty as a police officer, willfully and knowingly then as to each such defendant, your verdict should be guilty as charged.

I charge that in making a lawful arrest without a warrant for creating a traffic block or other breach must be in the presence of the officer before he is authorized to arrest the person or persons concerned while attempting to disperse the crowd.

However, these defendants are not here charged with creating a disturbance or creating a traffic block. They are charged with resisting, opposing or obstructing the officer who was trying to break it up, whether by making an arrest or otherwise.

To find any of the defendants guilty you must find the resistance, opposition or obstruction of lawful acts done by the officer by that defendant, whether or not he contributed to the original block or disturbance.

Request No. 9. I further charge you, ladies and gentlemen of the Jury, that it is the people's duty to prove any defendant guilty as charged beyond a reasonable doubt. The defendants do not have to take the witness stand to prove that they are not guilty, but if they do take the stand, you evaluate their testimony the same as you do that of other witnesses. Take into consideration that they have a direct interest in the outcome of the case; but you are to draw no inference as to the innocence or guilt of those who do not

take the witness stand in their own behalf, because they have a Constitutional right not to witness against themselves. It is the burden of the prosecutor to prove the defendants guilty beyond a reasonable doubt; it is not the duty of the defendants to prove their innocence. Therefore, a defendant need not be a witness against himself, and the choice of a defendant not to take the stand is not to be considered by the Jury as any evidence of guilt whatsoever.

Now, Request No. 10: The defendants also have presented as Request No. 10 their theory of the case. The request as drafted reviews the testimony favorably to the defendants. This has no place in the request to charge and I cannot give the requested charge.

I do, however, charge you that the theory of the defense is as follows: that a religious meeting was being held by persons of the Moslem religion, to teach their religion on Hastings Street at the corner of Livingston, and to hand out copies of a newspaper which featured their religion; that at first there was no obstruction of traffic, vehicular or pedestrian until the police arrived in numbers; that any traffic block or disturbance was done by the police officers, and there was, therefore, no justification for the action of the officers or for any arrests they made; that because the officers were acting unlawfully, none of the defendants could be guilty of opposing, resisting, or obstructing them in the performance of their lawful duties as officers; that defendants and others had a lawful and Constitutional right to assemble, to speak about religion in the streets as long as no disturbance of the peace or traffic block occurred, and that none did occur; that no ordinance was being violated, so that obstruction, resistance to officers who were not lawfully performing a duty in making an arrest or dispersing an unruly crowd, or a traffic block, was not the resisting of an officer within the meaning of the statute.

Now, what the Court has charged you as to these requests by the defendants is the law. The Court has already given some of them to you, and the Court will reiterate some later

in the Court's own language, but what the Court has charged you as requested is the law.

Now, members of the Jury, every person charged with a crime is presumed to be innocent until proven guilty. That presumption of innocence attaches to the defendants at the beginning of the trial, lasts with them during and throughout the trial and throughout your deliberations in your jury room, until you and each of you are satisfied beyond a reasonable doubt of the defendants' guilt.

The Court has said the State is required to prove each and every element of the offense beyond a reasonable doubt in order to sustain a conviction. It is, therefore, proper for the Court to tell you what is meant in law by that term reasonable doubt. Now, that term, members of the Jury, means just what those words in their ordinary English usage signify. It means a doubt for which you can assign a reason. It means an honest doubt. A reasonable doubt is not a vain, captious, imaginary or possible doubt, but a fair doubt, a doubt based on reason and common sense. It is a doubt growing out of the evidence or the insufficency of the evidence. It is such a doubt that after you have heard all of the competent testimony in the case, you cannot say you have an abiding conviction to a moral certainty of the defendants' guilt. If you have such a doubt, it is your duty to acquit the defendant or defendants; if you have no such doubt, it is equally your duty to convict the defendant or defendants.

Now, ladies and gentlemen, you are the sole determiners of the weight you will give to each and every witness's testimony. That is the purpose of bringing the witnesses here before you, so that you can see them, observe the demeanor of the witness on the stand, the apparent age of the witness, his apparent intelligence, his frankness or evasiveness, whether the testimony sounds reasonable or unreasonable, whether true or false, biased or unbiased, his interest or lack of interest, and all those things, ladies and gentlemen, as you see each and every witness appear before you and

hear him give his or her testimony. You size the witness up as it were, so you may give the testimony of each and every witness the weight you think it is entitled to, because the credibility of each and every witness and the weight which you will give to it is a question of fact for you, the Jury, and for you alone.

Now, members of the Jury, the defendants Joseph Martin and Ozzie Smith, and Russell Roberts have taken the stand in this case, and its your duty to weigh, analyze and consider their testimony exactly the same as you do that of any other witness in the case, bearing in mind, of course, that they are the defendants in the case and may have a direct interest in the outcome of the case. However, you seek to determine what the true facts are from their testimony exactly the same as you do that of other witnesses in the case. You will also apply the same tests to their testimony to determine its truth or falsity and the weight and credibility you will attach to their testimony. You have no right to discredit the testimony of the defendants merely because they are defendants in the case, but on the contrary, if you find their testimony to be rational, natural, and consistant, it may outweigh the testimony of all other witnesses and be sufficient for you to return a verdict of not guilty in their favor. You are not, however, bound to give their testimony any greater weight or credibility than you will that of any other witness. You will apply the tests that you as reasonable men and women of experience in life apply to determine the truth or falsity of the testimony of the witnesses.

Now, the defendants, Joseph Thomas, Jessie Gooden, Leroy Henderson, Elijah Walker, and Jack Boyd did not take the stand. Under our law the defendants may take the stand, or they may elect not to do so. When they do not take the stand in their own behalf, counsel have no right to comment on it, nor has the Court any right to comment on it, and you have no right to take that in consideration in any manner in arriving at your verdict. It is their right to take

the stand, or they may elect not to do so, as they shall choose, and you are not in any sense to construe that as against them.

Now, members of the Jury, you must take the law as the Court gives it to you, but with the determination of fact, the Court has no right in law to interfere and has no disposition to interfere, for the finding of fact, members of the Jury is your job. That responsibility rests squarely upon your shoulders and none other. Under your oathes you are in duty bound to find the facts fairly and squarely as you believe the testimony to warrant without reference to passion, or prejudice, sympathy, fear or favor, or what may happen to the defendant or defendants if you convict them or him, because that is the Court's responsibility. Your responsibility and your duty is to find the true facts. You owe that duty equally to the defendants and to the People of the State of Michigan. You take the testimony, ladies and gentlemen, all of it that has been allowed to stand in this case, rejecting from your minds and from your consideration all that has been stricken from the record, but considering all of the rest of it, all of the testimony that has come from the witness stand, you take that testimony and follow it to what you believe to be its true, honest, logical conclusion, just exactly as you see that testimony. You find the facts without fear or favor. You are not here to please anyone; you are here under your oathes in duty bound to find the true, cold, hard facts. You owe that duty equally to the defendants and to the People of the State of Michigan.

Now, this is a very important case, members of the Jury, both to the People and to the defendants. This is a case between the People of the State of Michigan and the defendants. You should give it your most careful consideration. As I have said before, you must not decide this case by reason of sympathy, fear, or prejudice; you must not be influenced by any of those emotions, but solely by a sense of justice and your obligations under your oathes. Take the evidence, weigh it conscientiously, carefully, and thor

oughly. If you are satisfied beyond a reasonable doubt that the People have proved their case, that the elements I have defined to you have been proved beyond a reasonable doubt, find the defendant or defendants guilty accordingly; if not, if the elements constituting the charge and the information have not been proved beyond a resaonable doubt, your verdict should be not guilty. Take the case under advisement, members of the Jury, and do your duty under your oathes. You have nothing to do in this case but determine the guilt or innocence of the defendents. You are the sole judges of the facts. The Court can give you the law, but you are absolute in the realm of facts. You must, as I have said, consider all of the evidence, but do not go outside of the evidence. Take what has been offered the competent evidence in this case.

Now, there are eight defendants; you may find all defendants guilty of obstructing, resisting, assaulting a police officer in the discharge of his duty, or you may find all of the defendants not guilty of the same charge, or you may find any number of the defendants guilty of obstructing, resisting, assaulting a police officer in the discharge of his duty, or you may find any number of the defendants not guilty of that charge.

Now, there are two possible verdicts: guilty as charged in the information of assaulting, resisting, obstructing a police officer in the discharge of his duty; or not guilty. I will repeat those two possible verdicts, however, not to emphasize either one of them. You may find the defendants guilty of obstructing, resisting, assaulting a police officer in the discharge of his duty, or any one of the defendants, or you may find any one of the defendants not guilty, or all of them not guilty.

Now, inasmuch as Constitutionally a Jury in this court consists of twelve jurors, the Clerk will place the names of all persons, fourteen jurors, in the jury box, and withdraw from the jury box the names of two members of the

panel; who will thereupon be excused from any further duties in connection with this case.

THE CLERK: Robert Schwartz.

THE COURT: Step down, Mr. Schwartz.

THE CLERK: Stella Carpentier.

THE COURT: Step aside, Mrs. Carpentier.

Swear in an officer.

(The Jury retired to deliberate at 11:55 o'clock, a.m.)

(At 12:35 o'clock, p.m., the Jury was excused for lunch, and returned to continue deliberation at 1:30 o'clock p.m.)

(The Jury returned to the courtroom at 2:57 o'clock p.m.)

(Roll call of Jury taken. All jurors present.)

THE CLERK: Members of the Jury, have you agreed upon a verdict, and, if so, who shall speak for you?

THE FOREMAN: We have, and I shall.

THE CLERK: What is your verdict?

THE FOREMAN: All eight guilty.

THE COURT: Guilty of what?

THE FOREMAN: Guilty of resisting arrest.

THE COURT: Assaulting, resisting, and opposing a police officer in the discharge of his duty?

THE FOREMAN: Yes, sir.

THE CLERK: Members of the Jury, raise your right hands and listen to your verdict as recorded. Do you solemnly say upon your oaths that you find the defendants, Joseph Martin, Joseph Thomas, Jessie Gooden, Russell Roberts, Leroy Henderson, Elijah Walker, Jack Boyd, and Ozzie Smith, Jr., guilty of resisting, obstructing, and assaulting a police officer in the discharge of his duty? So say you, Mr. Foreman; so say you all, members of the Jury?

THE FOREMAN: Yes.

THE JURY: Yes.

MR. NORRIS: If your Honor please, may I have the Jury polled, please?

THE COURT: Poll the Jury.

(The Jury was polled by the Clerk.)

THE COURT: The defendants will stand before the bar. Joseph Martin, Joseph Thomas, Jessie Gooden, Russell Roberts, Leroy Henderson, Elijah Walker, Jack Boyd, and Ozzie Smith, Jr., you have heard the verdict of the Jury. They found you guilty of the crime of assaulting, resisting, obstructing a police officer in the discharge of his duty.

I will refer this matter to the Probation Department, Psychiatric Clinic, with report on the 31st day of December of this year.

. . . . . .

ORDER DENYING LEAVE TO APPEAL

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 12th day of October in the year of our Lord one thousand nine hundred and fifty-nine.

Present: the Honorable John R. Dethmers, Chief Justice; Leland W. Carr, Harry F. Kelly, Talbot Smith, Eugene F. Black, George Edwards, John D. Voelker, Thomas M. Kavanagh, Associate Justices.

The People of the State of Michigan, Plaintiff,

vs.

Joseph Martin, et al., Defendants.

48487½ A-90524

In this cause an application is filed by defendants for leave to appeal from an order of the Recorder's Court for the City of Detroit and a brief in opposition thereto having been filed by plaintiff and due consideration thereof having been had by the court, it is ordered that the application be and the same is hereby denied.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original,

and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 19th day of October in the year of our Lord one thousand nine hundred and fifty-nine.

DONALD F. WINTERS, Clerk.

ORDER AFFIRMING DENIAL LEAVE TO APPEAL

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 24th day of November in the year of our Lord one thousand nine hundred and fifty-nine.

Present: the Honorable John R. Dethmers, Chief Justice; Leland W. Carr, Harry F. Kelly, Talbot Smith, Eugene F. Black, George Edwards, John D. Voelker, Thomas M. Kavanagh, Associate Justices.

The People of the State of Michigan, Plaintiff,

vs.

Joseph Martin, et al., Defendants.

48487½

In this cause a motion is filed by defendants for a reconsideration of the order heretofore entered herein on October 12, 1959, and an answer thereto having been filed by plaintiff, and due consideration thereof having been had by the Court, it is ordered that the order heretofore entered herein on October 12, 1959 as aforesaid stand affirmed.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and

affixed the seal of said Supreme Court at Lansing, this 30th day of November in the year of our Lord one thousand nine hundred and fifty-nine.

DONALD F. WINTERS, Clerk.

ORDER DENYING STAY, ETC.

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 30th day of November in the year of our Lord one thousand nine hundred and fifty-nine.

Present: the Honorable John R. Dethmers, Chief Justice; Leland W. Carr, Harry F. Kelly, Talbot Smith, George Edwards, John D. Voelker, Thomas M. Kavanagh, Associate Justices.

The People of the State of Michigan, Plaintiff,

vs.

Joseph Martin, et al., Defendants.

48487½

In this cause a motion is filed by defendants for a stay of proceedings and for a continuance of bond, and nothing in opposition thereto having been filed, and due consideration thereof having been had by the Court, it is ordered that the motion be and the same is hereby denied.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 1st day of December in the year of our Lord one thousand nine hundred and fifty-nine.

DONALD F. WINTERS, Clerk.

EXCERPTS FROM CRIMINAL JOURNAL OF THE RECORDER'S COURT OF THE CITY OF DETROIT

File No. A-90524

At a session of the Recorder's Court of the City of Detroit. In the County of Wayne, State of Michigan, held in and for said city at the court-room of said court.

Present: Hon. John P. O'Hara, Judge of the Recorder's Court and Recorder of the City of Detroit; Hon. Joseph A. Gillis, Gerald W. Groat, O. Z. Ide, Paul E. Krause, George Murphy, John A. Ricca, John P. Scallen, Frank G. Schemanske, W. McKay Skillman.

Judges of the Recorder's Court of the City of Detroit.

THE PEOPLE OF THE STATE OF MICHIGAN

v.

1. JOSEPH MARTIN
2. JOSEPH THOMAS
3. JESSIE GOODEN
4. RUSSELL ROBERTS
5. LEROY HENDERSON
6. ELIJAH WALKER
7. JACK BOYD
8. OZZIE SMITH, JR.

A-90524

Complainant—Max Neuendorf

Complaint Filed and Warrant Issued on July 9, 1957 by the Hon. John P. O'Hara

Complaint for Resisting and Obstructing an Officer in the Discharge of His Duty

On the seventeenth day of December, 1957.

The jury having been duly impanelled and sworn comes again into open court and in the presence of the defendants hears the conclusion of testimony.

The names of Stella A. Carpentier and Robert T. Swartz, jurors in this cause, were duly withdrawn from the jury box to conform with the requirements of the law.

The remaining jury of twelve hear the arguments of counsel and charge of the court, retire in charge of an officer duly sworn to attend them, after a time, return into open court and say upon their oaths that they find defendant guilty of resisting and obstructing an officer in performance of his duty. Section 750.479, Compiled Laws 1948. Court orders sentences deferred to the thirty-first day of December, 1957 and cause and defendants referred to the probation department and psychopathic clinic for investigation and examination and recognizance heretofore furnished continued in full force.

On the thirty-first day of December, 1957.

Defendants being in open court for sentence, being heard in response to the statutory questions propounded to him, the court orders defendants Joseph Martin, Jessie Gooden and Russell Roberts placed on probation, upon his personal recognizance for a period of two years, in charge of the probation department, and each defendant is further ordered to pay fifty dollars costs and full restitution within three months. Order of probation signed by the court.

Defendants Joseph Thomas, Leroy Henderson, Jack Boyd and Ozzie Smith each being aged twenty-five years, twenty-nine years, twenty-eight years, and twenty-seven years respectively, to be committed to the state prison of southern Michigan in the County of Jackson, the place designated by the Michigan Corrections Commission to be therein confined for a term of not less than three months nor more than two years, without recommendation. The maximum statutory penalty for the crime of which defendants stand convicted is two years. Warrants and commitment papers issued.

Warrants returned, duly served and filed.

Defendant Elijah Walker, being in open court for sentence, being heard in response to the statutory questions propounded to him is sentenced, he being aged thirty years, to be committed to the Detroit House of Correction, the place designated by the Michigan Corrections Commission to be therein confined for a term of three months straight. Warrant and commitment papers issued.

Warrant returned, duly served and filed.

On the second day of January, 1958.

Motion for new trial filed. Court ordered bond set at one thousand dollars with two good and sufficient sureties on defendants Joseph Thomas, Leroy Henderson, Elijah Walker, Jack Boyd and Ozzie Smith, Jr., and hearing on the seventh day of February, 1958.

On the seventeenth day of March, 1958.

Motion for new trial heard in part, court orders further hearing adjourned to the twenty-fifth day of March, 1958, and bonds continued as to each defendant.

On the twenty-fifth day of March, 1958.

Motion for new trial heretofore heard in part is now denied by the court as to defendants Joseph Thomas, Leroy Henderson, Elijah Walker, Jack Boyd and Ozzie Smith, Jr. Recognizance heretofore furnished ordered continued by the court pending appeal.

On the twenty-first day of October, 1959.

Defendant's application for Leave to Appeal is denied by the Michigan Supreme Court. All defendants are ordered to appear forthwith for sentence.

On the tweny-second day of October, 1959.

Sentence of Joseph Thomas, Leroy Henderson, Jack Boyd and Ozzie Smith, Jr., amended to ninety days straight in the Detroit House of Correction, the place designated by the Michigan Corrections Commission. Execution of sentence stayed on all defendants until the twelfth day of November, 1959 to allow an Application to Reconsideration before Michigan Supreme Court.

E COPY

Office-Supreme Court, U.S.
FILED
JUN 24 1960
WNING, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1959, No. 854 98

Appeal from the Recorder's Court of the City of Detroit

JOSEPH THOMAS, JOSEPH MARTIN, LEROY HENDERSON, ELIJAH WALKER, JESSIE GOODEN, RUSSELL ROBERTS, JACK BOYD AND OZZIE SMITH, JR.,
Appellants,

v.

PEOPLE OF THE STATE OF MICHIGAN,
Appellee.

RECEIVED
OFFICE OF
SUPREME

MOTION TO DISMISS

PAUL L. ADAMS
Attorney General of Michigan

SAMUEL J. TORINA
Solicitor General of Michigan
The Capitol, Lansing, Mich.

RECEIVED
JUN 24 1960
OFFICE OF THE
SUPREME

SAMUEL H. OLSEN
Prosecuting Attorney,
Wayne County, Michigan

SAMUEL J. BREZNER
Assistant Prosecuting Attorney,
Wayne County, Michigan
500 Police Headquarters Bldg.
Detroit 26, Michigan

Attorneys for Appellee

SPEAKER-HINES AND THOMAS, INC., LANSING, MICH. — 1960

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Ordinances and Statutes Involved	2
Statement of the Case	2
Questions Presented	4
Conclusion	10
Exhibit 1—Information	12

INDEX TO AUTHORITIES CITED

Cantwell v. Conn., 310 US 296, 306, 307	6
Schneider v. State, 308 US 160	5
Walters v. City of St. Louis, et al, 347 US 231, 98 L ed 660	5

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1959, No.

Appeal from the Recorder's Court of the City of Detroit

JOSEPH THOMAS, JOSEPH MARTIN, LEROY HENDERSON, ELIJAH WALKER, JESSIE GOODEN, RUSSELL ROBERTS, JACK BOYD AND OZZIE SMITH, JR.,

Appellants,

v.

PEOPLE OF THE STATE OF MICHIGAN,

Appellee.

MOTION TO DISMISS

Appellee moves that the appeal of the appellants from the Recorder's Court of the City of Detroit be dismissed for the reasons which will be set forth below.

OPINIONS BELOW

As stated by appellants, the Supreme Court of Michigan denied the application for leave to appeal without rendering a written opinion. This is in accordance with Michigan Court Rule 60 which provides that leave to appeal must first be obtained from the Supreme Court of Michigan. The appeal therefore is from the conviction in Recorder's Court which rendered no written opinion on the case.

JURISDICTION

Appellants attempt to invoke jurisdiction of this Court under 28 USCA, § 1257(a).

ORDINANCES AND STATUTES INVOLVED

Applicable provisions of the Michigan statutes and ordinances involved herein are correctly set forth in a Statement as to Jurisdiction (pp 3 and 4).

We would like to point out to this Court at this time that in their Statement as to Jurisdiction, the appellants mistakenly indicate that the penalty for violating the statute under which defendants were convicted is a felony. This is not true. It is a misdemeanor, as a reading of the statute will show.

The following Exhibit is included as Exhibit 1:

A certified copy of the Information issued against one of the defendants in this case, which is typical of all of the Informations issued in this case.

STATEMENT OF THE CASE

Appellee does not accept appellants Statement of the Case but believes it to be more accurately stated, in material part, as follows:

On July 7, 1957, uniformed Detroit police officers on scout-car patrol observed a crowd of some 150 persons at the intersection of Livingston and Hastings, in Detroit. They had congregated in the street, blocking vehicular

traffic. The officers attempted to move the people and enable traffic to move, but the crowd flowed back into the street. Loud shouts were heard and the crowd reassembled at the other corner. The officers returned to their car, drove to the station, and reported to their superior, Sergeant Max Neuendorf, who promptly went to the scene in uniform. He, too, saw 150 to 200 persons congregated, overflowing into both streets, blocking pedestrian and vehicular traffic; a speaker was addressing the crowd; the sergeant asked him to step from the stand so that they could converse; the speaker, later identified as defendant Elijah Walker, refused, and continued to talk to the crowd; the sergeant then stepped to the stand and asked the crowd to move down the street away from the intersection; Walker pulled him down and beat him about the neck; other officers intervened and seized Walker, and the crowd rushed at the officers.

Defendant Russell Roberts refused to obey an officer's instructions to step out of the street, and repeatedly attempted to force release of arrested persons who were seated in scout-cars. Defendant Leroy Henderson repeatedly sought to reach officers who were holding arrested persons and screamed, "You can't take our brothers. You can't take my brothers away." He was arrested after grappling with the sergeant.

Defendant Joseph Thomas leaped on the hood of a parked car and screamed to the crowd, "Down with the Caucasians. Look what they are doing." As he came down from the car at the sergeant's order, he attempted to kick the sergeant in the face, and was arrested.

Another officer (Douglas Fisher) told how Walker dragged the sergeant from the stand and struck him about the head, neck and shoulders. Another officer (David J.

Riley) testified that defendants Boyd and Martin rushed the police who were escorting Walker, under arrest, to the police car, and attempted to interfere, shouting, "Leave our brother alone."

Officer Mathew Parkinson described how defendant Ozzie Smith struck Patrolman Li gett twice as the officer was asking people to move north on the east side of Hastings; defendant Thomas was screaming: "Allah was God", and, "See what they are doing to you now. We are slaves.".

The eight defendants were arrested at the scene and were charged with violating Sec. 750.479, CL 1948, in obstructing, resisting, opposing, beating and wounding a police officer in the performance of his duty while attempting to disperse a crowd which was blocking traffic and disturbing the peace at a public intersection.

All defendants were convicted by a jury before Judge Gerald W. Groat, Judge of Recorders Court, Detroit.

QUESTIONS PRESENTED

If any federal question has been properly raised and presented, the Jurisdictional Statement does not accurately state such question.

Here defendants are attempting to invoke jurisdiction of this Court under 28 USCA, § 1257(a) by claiming that the statute under which defendants were convicted, § 750.479, CL 1948, Henderson's Mich Stat Ann § 28.747, violates the federal constitution inasmuch as it was based upon two ordinances of the City of Detroit, to-wit: Chapter 223, p 616, Sec. 2, Municipal Code, City of Detroit, 1954, and Chapter 339, Sec 12(a), p 1049 of such Code (Jurisdic-

tional Statement pp 2, 3, 4, and 5). Defendants assert these ordinances are void on their face as being repugnant to the 1st and 14th Amendments of the United States (Jurisdictional Statement p 3).

We answer as follows:

1. The defendants were not convicted of violating these ordinances but were convicted of violating § 750.479, CL 1948. The cases cited by appellants in support of their claim that this Court has jurisdiction in this matter resulted from convictions for violating the ordinances involved.

The Michigan court did not at any time determine the constitutionality of these ordinances, and therefore this Court is precluded from determining these questions at this time. As was held in *Walters v. City of St. Louis, et al*, 347 US 231, 98 L ed 660, "The United States Supreme Court will not undertake to review what a state court below did not decide."

2. Moreover, the ordinances are not unconstitutional on their face, as claimed by appellants. The First Amendment rights which the appellants are seeking to assert through the 14th Amendment, to-wit: freedom of speech and religion — are not absolute, as claimed by appellants, but are subject to restriction by a state i. the proper exercise of their police power of regulating the use of their public streets in such a manner that the public use or enjoyment of the same shall not be obstructed or incommoded, as was stated by this court in *Schneider v. State*, 308 US 160:

> "Municipal authorities, as trustees for the public have the duty to keep their communities' streets open and available for movement of people and property,

the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets. For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion."

And in *Cantwell v. Conn.*, 310 US 296, 306, 307, this Court stated:

"Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct. Even the exercise of religion may be at some slight inconvenience in order that the State may protect its citizens from injury. Without doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause.

which he purports to represent. The State is likewise free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience. But, to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.

"*Second.* We hold that, in the circumstances disclosed, the conviction of Jesse Cantwell on the fifth count must be set aside. Decision as to the lawfulness of the conviction demands the weighing of two conflicting interests. The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged. The State of Connecticut has an obvious interest in the preservation and protection of peace and good order within her borders. We must determine whether the alleged protection of the State's interest, means to which end would, in the absence of limitation by the Federal Constitution, lie wholly within the State's discretion, has been pressed, in this instance, to a point where it has come into fatal collision with the overriding interest protected by the federal compact."

3. In the present case, the instructions of the trial court properly presented the law in such a fashion as to protect the interest of the public and the rights of the defendant in accordance with the above decision. In instructing the jury, the Court stated:-

"Now, it is the theory of the People in this case that the officer of the Detroit Police Department observed a crowd of people, one to two hundred in number, at the intersection of Livingston and Hastings Street in the City of Detroit, being held there by a speaker; said crowd was blocking vehicular and pedestrian traffic; that Sergeant Neuendorf returned to disperse said blocking of traffic by the crowd; that he was assaulted by one of the — by one and obstructed by others in an effort to disperse said group." (Statement as to Jurisdiction, App p 2)

And at the request of the defendants, the Court gave the following instructions.

"I do, however, charge you that the theory of the defense is as follows: that a religious meeting was being held by persons of the Moslem religion, to teach their religion on Hastings Street at the corner of Livingston, and to hand out copies of a newspaper which featured their religion; that at first there was no obstruction of traffic, vehicular or pedestrian until the police arrived in numbers; that any traffic block or disturbance was done by the police officers, and there was, therefore, no justification for the action of the officers or for any arrests they made; that because the officers were acting unlawfully, none of the defendants could be guilty of opposing, resisting, or obstructing them in the performance of their lawful duties as officers; that defendants and others had a lawful and Constitutional right to assemble, to speak about religion in the streets as long as no disturbance of the peace or traffic block occurred, and that none did occur; that no ordinance was being violated, so that obstruction, resistance to officers who were not lawfully performing a duty in making an arrest or dis-

persing an unruly crowd, or a traffic block, was not the resisting of an officer within the meaning of the statute." (Statement as to Jurisdiction, App p 7):

As a result of these instructions, a question of fact was presented to the jury, which was decided adversely to appellants. The verdict therefore is not subject to review by this Court.

4. The appellants claim that they were deprived of due process because the Information does not state that they willfully and knowingly committed the acts for which they were convicted. However, the Information does state that the acts were committed

"contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the People of the State of Michigan.

Note—See Sec. 750.479 C.L. 1948"

Section 750.479 CL 1948 provides that the actions must have been performed "willfully and knowingly" and the Judge in his charge to the jury stated:

"Request No. 2 I give with modification, where the statute requires that in order to constitute the offense the act must be done knowingly and willfully. The Court construes these words literally. To convict the defendants or any defendant, you must be first satisfied from the evidence beyond a reasonable doubt that such defendant knew that Max Neuendorf was at the intersection to disperse a crowd which was alleged to be blocking traffic and disturbing the peace, and that knowing such facts, such defendant intentionally did resist, or obstruct, or oppose, or beat or wound Max

Neuendorf while executing his duty. The words 'knowingly' and 'willfully' require that to be guilty, any defendant knew that Max Neuendorf was in the act of attempting to disperse a crowd which was blocking traffic or disturbing the peace, or both, and that the defendants, or any one of them you find guilty, acted to prevent Max Neuendorf from performing his lawful duty as a police officer, or to resist, obstruct, or oppose his performance.'

Under these circumstances, it is clear that the defendants' assertion that they were deprived of due process because they were not given a reasonable notice of the charges made against them and were not afforded an opportunity to examine adverse witnesses on the charge of which they did not have notice (Statement as to Jurisdiction p 17) is clearly without merit.

CONCLUSION

For the above reasons, it is respectfully requested that the appeal filed by the appellants be dismissed.

PAUL L. ADAMS
Attorney General of Michigan
SAMUEL J. TORINA
Solicitor General of Michigan
The Capitol, Lansing, Mich.
SAMUEL H. OLSEN
Prosecuting Attorney,
Wayne County, Michigan
SAMUEL J. BREZNER
Assistant Prosecuting Attorney,
Wayne County, Michigan
500 Police Headquarters Bldg.
Detroit 26, Michigan
Attorneys for Appellee

EXHIBIT 1

THE RECORDER'S COURT
of the
CITY OF DETROIT

THE PEOPLE OF THE STATE OF MICHIGAN

vs.

JOSEPH MARTIN
JOSEPH THOMAS
JESSIE GOODEN
RUSSELL ROBERTS
LEROY HENDERSON
ELIJAH WALKER
JACK BOYD
OZZIE SMITH, Jr.

No. A-90524

Information for

OBSTRUCTING, RESISTING AND ASSAULTING A POLICE OFFICER IN DISCHARGE OF HIS DUTY

WITNESSES

MAX NEUENDORF
CHESTER CHMIELEWSKI
LAWRENCE PEW
DAVID RILEY
DOUGLAS FISHER
EUGENE MAJEWSKI
JOSEPH GEROMETTE
JOHN LOFTIS
RICHARD GREEN
MATHEW PARKINSON
THOMAS DUANE
RICHARD ACHE

ALAN HELQUIST
ROBERT KALICZYNSKI
HAROLD LIGGETT
FRANCIS LOESCHE
RONALD JENNINGS
ROBERT SETCHELL
MARTIN O'GRADY
DAVID SIMS
ROBERT CARRIVEAU
BARRY MOORE
PAUL ROSZKOWSKI
LEWIS GIZZI
GILBERT KOHLS
DONALD WATSON
HENRY SCHULTZ
REX WALDORPH
ROBERT FOISEY
JOHN KENNEDY
PAUL HURVDOS
THOMAS McWATERS
JAMES SCANLON
THADDEUS KOSMOSKI
JAMES DUVAL
JAMES DOWNEY
CARL SILVERS
EDWARD FENNELLY
NATHANIEL JUSTICE
JONATHAN MARROW
WILLIAM LOWE
LAWRENCE MULVEHILL

(Endorsed on motion of APA Bailer)

STATE OF MICHIGAN,
County of Wayne
City of Detroit
} ss.

The Recorder's Court of the City of Detroit

In the Name of the People of the State of Michigan, GERALD K. O'BRIEN, Prosecuting Attorney in and for the said County of Wayne, who prosecutes for and on behalf of the People of said State in said Court, comes now here in said Court in the July term thereof, A.D. 1957, and gives the said Court to understand and be informed that JOSEPH MARTIN, JOSEPH THOMAS, JESSIE GOODEN, RUSSELL ROBERTS, LEROY HENDERSON, ELIJAH WALKER, JACK BOYD and OZZIE SMITH, Jr. late of the said City of Detroit, in said County, heretofore, to-wit, on the 7th day of July, A.D. 1957, at the said City of Detroit, in the County aforesaid did then and there obstruct, resist, oppose, assault, beat and wound one Max Neuendorf, a member of the Metropolitan Police Department of the City of Detroit, and duly authorized by law to maintain and preserve the peace, w ile he, the said Max Neuendorf was then and there lawfull attempting to disperse a crowd of people who were blocking traffic and disturbing the peace at Hastings and Livingston Streets, in the City of Detroit; contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the People of the State of Michigan.

Note—See Sec. 750.479 C.L. 1948

(sgd) Gerald K. O'Brien
Prosecuting Attorney

Drafted by (sge) John J. Rusinack
/tbl

FILED
JAN 8

In The

Supreme Court of the United States

October Term, [redacted] 1960

Number [redacted] 981

Joseph Thomas, Joseph Martin, Leroy Henderson, Eldad Walker, Jessie Gooden, Russell Roberts, Jack Boyd and Ozzie Smith, Jr.,
Appellants,

v.

People of the State of Michigan,
Appellee.

Appeal from the Recorder's Court of the City of Detroit

BRIEF IN OPPOSITION TO MOTION TO DISMISS

Harold Norris
1179 National Bank Building
Detroit 26, Michigan

H. Franklin Brown
602 American Title Building
Detroit 26, Michigan

Attorneys for Appellants

Printed by Blake Printing Co., 409 Gratiot, Det. 26, Mich.

INDEX

ORDINANCES AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

QUESTIONS PRESENTED 2

CONCLUSION 4

APPENDIX 5

REQUEST TO CHARGE 5

CITATIONS

Cole v. *Arkansas*, 33 U.S. 196 4

Kovacs v. *Cooper*, 336 U.S. 77 4

Marsh v. *Alabama*, 326 U.S. 501 4

Saia v. *N.Y.*, 334 U.S. 558 4

Williams v. *New York*, 337 U.S. 241 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

Number 954

JOSEPH THOMAS, JOSEPH MARTIN, LEROY HENDERSON, ELIJAH WALKER, JESSIE GOODEN, RUSSELL ROBERTS, JACK BOYD AND OZZIE SMITH, JR.,
Appellants,

v.

PEOPLE OF THE STATE OF MICHIGAN,
Appellee.

Appeal from the Recorder's Court of the City of Detroit

BRIEF IN OPPOSITION TO MOTION TO DISMISS

The Appellants respectfully submit that the Motion to Dismiss filed by the Appellee be denied. We consider in this brief the more material points raised by Appellee's Motion to Dismiss.

ORDINANCES AND STATUTES INVOLVED

It is to be noted that Appellee agrees that the "applicable provisions of the Michigan Statutes and Ordinances involved herein are correctly set forth in a Statement as to Jurisdiction (p. 2)." Appellants assert therefore that it is irrelevant to the constitutional questions and issues presented to this Court that the alleged acts are characterized as "a felony", or "a misdemeanor". As a matter of fact, however, the acts which the applicable Michigan Statute proscribes constitutes a "high misdemeanor".

STATEMENT OF THE CASE

Appellants invite the Court's attention to their "Statement of the Case" as presented on p.p. 5-14 of the "Statement as to Jurisdiction". Appellants assert that Appellee's Statement of the Case recites partial testimony out of context and gives a misleading impression for an evaluation of this case.

Moreover, Appellee is factually wrong wherein he asserts as a material and accurate fact "the speaker, later identified as defendant ELIJAH WALKER, refused, and continued to talk to the crowd; the sergeant then stepped to the stand and asked the crowd to move down the street, away from the intersection; Walker pulled him down and beat him about the neck; other officers intervened and seized Walker, and the crowd rushed at the officers" (p. 3. Motion to Dismiss).

The alleged fact as to who the speaker was is pivotal and strategic in this case. The transcript clearly indicates that the party who was speaking and who is identified as ELIJAH WALKER, both at trial and in Appellants' Statement of the Case was in fact Mr. CARA WOODS, who is not a defendant. (Transcript p. 144—Testimony of December 16, 1957). This material error on the part of Appellee should reasonably cast doubt upon the remainder of the Appellee's Statement of the Case.

QUESTIONS PRESENTED

The Appellants have properly raised and presented substantial constitutional questions as the bases for this Court to exercise jurisdiction (p.p. 4-5 Statement as to Jurisdiction). Appellants assert that the questions therein presented were properly raised. More particularly Appellants' reply to Appellee's assertions that

(1) "The defendants were not convicted of violating these Ordinances but were convicted of violating 750.479, C.L. 1948. The cases cited by Appellants in

support of their claim that this Court has jurisdiction in this matter resulted from convictions for violating the ordinances involved."

(2) "The Michigan Court did not at any time determine the constitutionality of these ordinances, and therefore this Court is precluded from determining these questions at this time. As was held in Walters v. City of St. Louis, et al, 347 U.S., 98 L. ed 660. "The United States Supreme Court will not undertake to review what a state court below did not decide." (p. 5—Motion to Dismiss).

Appellants assert that the State Court below did rule by its disposition of Appellants' Request to Charge. Appellants invite this Court's attention to Request to Charge six (6), seven (7) and eight (8). See Appendix. The denial of these requests certainly constitute a ruling of the Court on the ordinances in question and their constitutionality.

It will be noted, therefore, that the Appellee is in error when it states that "the defendants were not convicted of violating these ordinances," and that "The Michigan Court did not at any time determine the constitutionality of these ordinances."

The Appellants, moreover, assert they have urged that the ordinances in question are unconstitutional on their face, *and as applied*. In short, appropriate constitutional questions were properly raised and presented that create the bases for the assumption of jurisdiction by this Court.

In point number four (4) of Appellee's Motion to Dismiss on page 9, Appellee admits that the Information under which Appellants were charged and convicted "does not state that they wilfully and knowingly committed the acts for which they were convicted."

Appellee then cite that section 750.479 CL 1948 "provides that the actions must have been performed "Wilfully and Knowingly."

This strategic and pivotal ingredient of the offense charged was omitted by Appellee and the Court despite Appellants' repeated Motions and Objections, until the final act of charging the jury on the part of the Court. This essential ingredient was omitted from the Information, the examination, the entire trial and proofs and cross-examination, and argument of the prosecutor and counsel. The only point in the entire trial at which this essential ingredient was brought to the attention of the jurors was by the Court in his Charge to the Jury. p. 3 Appendix—Statement as To Jurisdiction.) It is clear, therefore, that the Defendants and Appellants were deprived of due process, were not given a reasonable notice of the charges made against them, and were not afforded an opportunity to examine adverse witnesses on the charge of which they did not have notice. The Appellants are being sent to prison on a charge not made or tried. This is error. Cole v. Arkansas, 33 U.S. 196, Kovacs v. Cooper, 336 U.S. 77, Marsh v. Alabama, 326 U.S. 501, Saia v. N.Y. 334 U.S. 558, Williams v. New York, 337 U.S. 241.

CONCLUSION

Accordingly it is respectfully requested that the Motion to Dismiss filed by Appellee be denied.

HAROLD NORRIS
1179 National Bank Building
Detroit 26, Michigan

H. FRANKLIN BROWN
602 American Title Building
Detroit 26, Michigan

Attorneys for Appellants

APPENDIX

REQUEST TO CHARGE

6. I further charge you that in order to find each of the Defendants guilty of the offense charged, you must find beyond a reasonable doubt that Sgt. NEUENDORF was in the lawful performance of his duties and that for said duties to be lawful, you must find as a matter of fact, beyond a reasonable doubt, that "a person or persons did make or assist in making any noise, disturbance or improper diversion, or rout or riot, by which the peace and good order of the neighborhood are disturbed" or that "persons did assemble, congregate or gather with others in crowds on any sidewalk or street in such a manner as to obstruct or incommode public travel or the public use and enjoyment of same."

I charge you further that a violation of either or both of the ordinances in the presence of an officer must be proved beyond a reasonable doubt as an essential requirement of the offense charged and that unless you find such a violation to have existed, you must find each of the defendants not guilty.

7. I further charge you that the Defendants and each of them did have a constitutional right under the United States and Michigan Constitutions to use the sidewalks and streets for the exercise of their rights of freedom of religion, freedom of assembly and freedom of speech and that it is not lawful for officers to enforce or regulate conduct thereunder an ordinance or ordinances in such a way as to abridge or deny these constitutional rights of the Defendants.

8. I further charged you that the Defendants are also charged with violating two ordinances of the City of Detroit; These ordinances alleged to be involved are:

"It shall be unlawful for any person to assemble, congregate or gather, with others in crowds on any sidewalk

or street, or upon the Campus Martius, in such a manner as to obstruct or incommode public travel or the public use of enjoyment of the same", and

"Any person or persons who shall make or assist in making any noice, disturbance or improper diversions, or any rout or riot, by which the peace and good order of the neighborhood are disturbed, shall be guilty of Disorderly Conduct and shall be punished as hereinbefore provided".

Now it is the contention of the defense that the first ordinance is unconstitutional on its face, and if not unconstitutional on its face, the application of the said ordinance is unconstitutional because it places blocking and obstructing of traffic above the rights of freedom of speech, freedom of assembly and freedom of religion as guaranteed by the Federal and State Constitution. Now I charge you as a matter of law that the Constitutionality or unconstitutionality of a law, ordinance or statute is within the province of this Court and you may not pass on this phase of the matter, but it is within the province of the jury as the trier of facts whether or not these eight Defendants did congregate, assemble or gather on the streets of Hastings and Livingstone in such a manner as to obstruct or incommode public travel or the public use of enjoyment of the same. I further charge you that you must find beyond a reasonable doubt, as hereinbefore defined, that the defendants, and each of them, did assist in making noise, disturbance or improper diversions or rout or riot by which the peace and good order of the neighborhood was disturbed; in the presence of the said MAX NEUENDORF; That I further charge you that you must take into consideration the testimony as given and determine whether or not there had been a disturbance of the peace prior to the arrival of the police and that it became necessary for the police to take the action described because of the disturbance; If you find that there was no disturbance of the peace

by each of the defendants prior to the time that MAX NEUENDORF arrived then you must find each of them not guilty, but on the other hand if you find from the testimony beyond a reasonable doubt that at the time that MAX NEUENDORF arrived at the scene the said MAX NEUENDORF found that there was a disturbance of the peace by each of these Defendants in the presence of MAX NEUENDORF, then it is your duty to return a verdict of guilty for each of the Defendants, or to such Defendants that you find are guilty of such act or acts as determined by the evidence beyond a reasonable doubt.

I have stated to you that these violations of these ordinances must have been in the presence of MAX NEUENDORF because unless a Misdemeanor is committed in the presence of a Police Officer he has no legal right to make an arrest without a valid Warrant. I further charge you that each of the Defendants that are charged of violating the law must have violated the law in the presence of MAX NEUENDORF, because the Information only charges the Defendants with acts against the said MAX NEUENDORF and until the Information is proved as charged, you must acquit the defendants.